

No. 10,359

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FLOTATION SYSTEMS, INC. (a corporation),
and UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY (a corporation),

Appellants,

VS.

UNITED STATES for use of ANDREW POLLIA,
T. G. SHANNON and B. W. MACKIE, co-
partners doing business under the ficti-
tious name and style of Shanmac Co.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

JOHN D. HARLOE,

De Young Building, San Francisco,

*Attorney for Appellants
and Petitioners.*

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PAUL P. O'BRIEN

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*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The appellants respectfully ask for a rehearing in this cause upon all the grounds which are set forth in the appellants' briefs in the cause but as we feel that it is probable that the Court will, on a petition for rehearing, consider only those points which its opinion failed to note or in connection with which we believe mistake has been made, we shall confine our argument on this petition to only one point, to-wit:

POINT ONE.

THAT THE COURT TOOK INTO CONSIDERATION ONLY PART OF THE OFFSETS PLEADED IN ITS ANSWER BY APPELLANTS.

We quote that part of the opinion:

“In its answer Flotation pleaded by way of offset the sum of \$705.72 paid by it in discharge of certain bills which it was said Pollia should have, but did not, pay.”

Flotation in its answer pleaded by way of offset and counterclaim two separate distinct amounts, one for materials paid by it for Pollia, an itemized account of which was attached to the answer and marked “Exhibit B”, totaling the sum of \$705.72. This offset was taken into consideration by this Court in its modification of the judgment. Flotation also pleaded in its answer certain bills paid to materialmen in the sum of \$1465.58 which bills were itemized and attached to the answer and marked “Exhibit C”. This offset was not taken into consideration by this Court.

Again quoting from the opinion:

“Flotation offered evidence in support of this offset, and so far as we can see there is no counter-vailing proof.”

The same applies to the offsets pleaded and itemized in “Exhibit C” in the sum of \$1465.58 and in the trial of the action, plaintiff not only did not dispute the correctness of these bills or these items of “Exhibit C”, but specifically authorized the payment thereof (R. 101 and 105), wherein Theodore Tamba, attorney for Pollia, testified as follows:

“There was discussion between Mr. Harloe and me regarding the payment of certain claims which were made against the Flotation by reason of work furnished to Mr. Pollia by certain materialmen and Mr. Harloe asked me, in Mr. Pollia’s presence, if it would be alright to pay those claims or those materialmen, whatever they were and I said that was agreeable.”

Therefore, the payment of these bills having been authorized by plaintiff and Flotation having proved the payment thereof and said proof not having been disputed by plaintiff, the correctness is admitted.

We therefore submit that this offset in the sum of \$1465.58 should be allowed, making the total offset and modification in the sum of \$2171.30.

Dated, San Francisco,
July 16, 1943.

Respectfully submitted,

JOHN D. HARLOE,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants in the above-entitled cause and in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 16, 1943.

JOHN D. HARLOE,
*Counsel for Appellants
and Petitioners.*